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No. 71-185

In the Supreme Court of the United States

OCTOBER TERM, 1971

JOSE T. ACFALLE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This is an action for additional pay allegedly due a number of present and former civilian employees employed between 1962 and 1968 at the United States Naval Supply Depot, Guam.

In June 1962, employees at the Naval Supply Depot then holding the rating of stevedore were demoted to the grade of laborer through a reduction in force. Petitioners alleged that during their subsequent employment, they spent more than 50 percent of their time doing stevedoring work. Petitioners received stevedore pay when actually performing this stevedoring work and laborer pay while performing laborer

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work, but claim that they should have been paid full time at the rating of stevedore. Their claim is based on a Navy regulation set forth in the opinion below (Pet. App. 2a). There is no record that any of petitioners ever filed an appeal of the 1962 reduction in force either to the Civil Service Commission or to the Department of the Navy, or that any of petitioners subsequently filed a grievance with the Department of the Navy under Navy Civilian Personnel Instruction procedures.

The district court granted the government's motion for summary judgment, and the court of appeals affirmed, holding in a *per curiam* opinion that petitioners' failure to seek an administrative appeal before the Chief of Industrial Relations under Navy Civilian Personnel Instructions 531.3–8 barred the present action (Pet. App. 1a–2a).

The decision of the court below is correct and conflicts with no other reported decision. Since petitioners concede that they were paid at stevedore rates when actually performing stevedore work (Pet. 4), their claim for full-time stevedore pay based on their performance of more than 50 percent of their work at stevedore duties necessarily—as the court of appeals expressly found—"depends upon a change of rating" (Pet. App. 2a). Accordingly, petitioners' failure to exhaust administrative remedies available to contest changes in rating bars the present action. *Krennrich* v. *United States*, 340 F.2d 653 (Ct. Cl.), certiorari

denied, 382 U.S. 870; *Johnson* v. *Nelson*, 180 F. 2d 386 (C.A.D.C.), certiorari denied, 339 U.S. 957.[1]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1971.

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[1] The decisions claimed by petitioners to be in conflict with the decision below are inapposite. In *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394, this Court dealt with issues concerning the coverage of the standard government contract "disputes" clause. No such issues are involved in the present case. Similarly, the Court of Claims decision in *Piccone* v. *United States*, 407 F. 2d 866, involved a Navy regulation relating to the procedures for disability separation or retirement.

CERTIORARI DENIED N.C.R.

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